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Supreme Court, U.S.
FILED

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UNITED STATES SUPREME COURT

OCTOBER 1996 TERM

MARIA FELINSKA,
PETITIONER

V.

NEW ENGLAND TEAMSTERS AND TRUCKING
INDUSTRY PENSION FUND,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Maria Felinska,
By her attorney,
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26 pp

Whether the United States Court of Appeals for the First Circuit erred in Affirming the United States District Court for the District of Massachusetts which had Ruled that the Plaintiff-Appellant-Petitioner below, Maria Felinska, had failed to meet her burden at Summary Judgment to produce evidence sufficient to sustain a finding that the Defendant-Respondent, New England Teamsters and Trucking Industry Pension Fund (hereinafter the **Teamsters**), had discriminated against Felinska within the meaning of 29 U.S.C. S. 623, the Age Discrimination in Employment Act.

LIST OF PARTIES

See Caption pursuant to Rule 14.1.(b).

CITATIONS TO UNOFFICIAL REPORTS

United States District Court, District of Massachusetts, No. 93-10242-NG

United States Court of Appeals for the First Circuit - No. 96-1589.

JURISDICTIONAL BASIS

Date of Judgment Sought to Be Reviewed

November 6, 1996

Date of Order Respecting Rehearing

November 27, 1996

Statutory Provision Conferring Jurisdiction to Review Writ of Certiorari

28 U.S.C. 1254(1).

STATUTE INVOLVED

29 U.S.C. 623. AGE DISCRIMINATION IN EMPLOYMENT ACT. Please see Appendix for full text.

STATEMENT OF THE CASE

The below case was one for age discrimination in employment under federal law. Felinska had resigned under extreme mental duress after several years of cruel mistreatment from her employment with the Teamsters in late March, 1991, because her working conditions had become objectively intolerable. She had served the Teamsters for over twenty-five loyal years. The only issue contested at the time Defendants Moved for Summary Judgment was whether Defendant, Teamsters, had violated the ADEA in causing Felinska's resignation from employment (the constructive discharge issue).

BASIS OF FEDERAL JURISDICTION IN THE U.S. DISTRICT COURT

28 U.S.C. 1331, Federal Question.

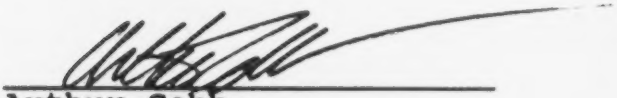
ARGUMENT

The U.S. Court of Appeals for the First Circuit did not correctly apply 29 U.S.C. 623 to the facts of the case below. The Court ignored the bulk of the summary judgment record respecting clear disparate treatment in favor of the younger co-worker whom Felinska was forced to train to take her own job. This clearly created a genuine issue of material fact that the Petitioner, Felinska, had been discriminated against in the terms and conditions of her employment on account of her age.

The said Appeals Court's Decision conflicts with relevant decisions of the U.S. Supreme Court. Namely, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and St. Mary's Honor Center v. Hicks, --U.S.--, 113 S.Ct. 2742 (1993) jointly require that once Felinska had evidence sufficient to sustain a finding that the Teamster's reasons for disparately treating her were pretextual, and that mendacity was ever present in the Teamster's feigned legal posturing, then an inference could be drawn that the

real reason for Felinska's mistreatment at the hands of the Teamsters was age discrimination.

Respectfully submitted,
Maria Felinska,
By her attorney,



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APPENDIX

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1589

MARIA FELINSKA,

Plaintiff, Appellant

v.

NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[HON. Nancy Gertner, U.S. District Judge]

Before

Cyr, Boudin and Lynch, Circuit Judges.

Matthew Cobb for Appellant.
Anne McCully Murphy with whom Charles P. O'Connor, Morgan, Lewis & Bockius, LLP, Christopher N. Souris and Feinberg, Charnas & Birmingham, P.C. are on brief for appellee.

November 6, 1996

Per Curiam.

Maria Felinska appeals from the district court's summary judgment dismissing her claim that her former employer had discriminated against her by constructively discharging her because of her age in violation of the Age Discrimination in Employment Act, 29 U.S.C. 621, et seq. The District Court ruled that Felinska had not presented a prima facie case because, even accepting her allegations of fact as true, they did not demonstrate a constructive discharge. Greenberg v. Union Camp Corp., 48 F.3d 22, 26 (1st.Cir. 1995). After viewing the parties briefs and the record, we affirm substantially for the reasons given by the District Court.

Affirmed.

ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. 93-10242-NG

MARIA FELINSKA,
Plaintiff

v.

NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND and CHARLES LANGONE, FUND MANAGER of the NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND,

Defendants

February 20, 1996

MEMORANDUM AND DECISION

GERTNER, D.J.

For approximately 26 years, plaintiff Maria Felinska worked as a bookkeeper for the defendant New England Teamsters and Trucking Industry Pension Fund ("the Fund"). Felinska began working in 1965 as one of two bookkeepers at the Fund. After the departure of her co-worker, Felinska became the Fund's principal bookkeeper, a position she held until her resignation on

March 29, 1991.

Subsequent to her resignation, Felinska brought this action against the Fund and its director, Charles Langone. She alleged, under various theories, that her resignation had not been voluntary, but rather a constructive discharge resulting from unlawful discrimination. She also made claims of defamation and intentional infliction of emotional distress. On prior motions, a judge of this court dismissed all of Felinska's claims except those alleging age discrimination (in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq.) (Counts I, III, IV, VI and XIII), and defamation (Count XII).[1]

Defendants now move for summary judgment with respect to the remaining claims. Plaintiff has not opposed the motion with respect to her defamation claims, nor with respect to her ADEA claims to the extent they relate to an alleged attempt to avoid paying her a higher pension benefit. Plaintiff has also not opposed defendant Langone's motion to dismiss the ADEA claims against him, since he was never named in an EEOC charge. This leaves plaintiff's age discrimination claim against the Fund for consideration by the court.

II. FACTS

From about 1966 to 1975, Felinska was the Fund's sole bookkeeper. In 1975, the Fund hired an additional bookkeeper, Dorothy Langone, because it was felt that the Fund had more work than Felinska could handle on her own. Ms. Langone worked at the Fund, alongside Felinska, until she died in 1988.

After Ms. Langone's demise, Felinska temporarily took up some of her duties. In the spring of 1989, however, the Fund assigned Marilyn Tower, who had been working in the Fund's data processing department, to fill Ms. Langone's position. Tower apparently did not have extensive bookkeeping experience, and, according to Felinska, the Fund sent her to a bookkeeping course shortly after she took over the position. In addition, Felinska was instructed by Helen Debreceni, the then Fund manager, to train Tower in bookkeeping functions.

In the summer of 1989, Debreceni appointed Arlene Brewster to be Felinska's and Tower's immediate supervisor. Brewster and Felinska apparently did not take to each other. In one incident, in the fall of 1989, Felinska went on vacation for three weeks and Brewster was unable to locate the Fund's general ledger book. Upon Felinska's return, Brewster asked her, at approximately 7:30 a.m.,

where the general ledger was. First, Felinska said that it was on a shelf, but it was not. Then she said that she would give Brewster the ledger, but not until 7:55 a.m. As a result, Felinska received a formal warning from Debreceni.

In May of 1989, the Fund began to computerize its accounting system, using the "Solomon III" system from IBM. IBM provided training to Fund staff members and Felinska was told, either by Debreceni or another supervisor, Eve Kertesz, that she (Felinska) would be trained to use the computer system along with Tower.

Felinska was disappointed in a number of aspects of the computerization process. First, she contends, the computer terminal which the Fund ordered was "left handed." According to Felinska, this meant that the terminal platform had a slightly larger workspace to the left of the keyboard than to the right. Felinska is right-handed, while Tower is apparently left-handed. Felinska admits, however, that right-handed people are able to use the terminal.

Felinska also contends that Tower received preferential training on the computer system over herself. While she admits that, on a number of occasions, she received training along with

Tower from IBM trainers, she contends that Tower sat at the terminal more frequently than she did during the training sessions, that the instructor tended to address himself more towards Tower than herself, and that she received training only in operating the accounts payable function of the system. In her deposition, however, Felinska admits that numerous other topics were covered in the training sessions which she attended. Felinska also admits that Tower was more skillful on the computer than she was.

Eventually, Felinska complained to Debreceni that she was not receiving an equal amount of training from the instructors. Debreceni told her that the instructor would teach Tower, who would then teach her. Felinska also acknowledges that she was permitted to take training manuals home to read, and that sometimes Tower would explain how to operate certain of the functions. Ultimately, Felinska admits that she spent some time every day practicing on the new computer system and that, as of the time she left the Fund, she had at least an average ability to use the system.

On February 28, 1990, Felinska filed a written notice of resignation to the Fund, effective March 30, 1990. She told Debreceni that she was quitting because

she had a job at Chemical Bank. She also said that she was leaving because of Arlene Brewster, although she made no specific complaints about her. After Debreceni asked her to stay, she changed her mind and agreed to stay.

In October 31, 1990, Felinska once again filed a notice of resignation with the Fund. This time she complained to Debreceni that she was leaving because the job made it difficult to travel to New York City on the weekend. Debreceni once again asked her to stay, and agreed to allow Felinska to leave 15 minutes earlier on Fridays to avoid this problem. Once again Felinska changed her mind and agreed to stay with the Fund.

In October of 1990, Debreceni retired, and Charles Langone became the Fund Director. Langone had not been involved in appointing Arlene Brewster. He now says that he might not have made that choice had it been his to make. He describes Brewster as lacking "people skills," and having a reputation for being overbearing and tactless with all employees. He says that he did not immediately remove her from her position, however, because he wanted to observe her effectiveness.

Felinska admits that she had a good relationship with
Langone, and Langone states that he thought Felinska's work was satisfactory.

Felinska however, continued to resent Brewster's managerial style. In January, 1991, she told Langone that Brewster was impossible to work with and that if he did not do something about it, she would quit. However, she does not remember making any specific complaint about Brewster. In response, Langone asked her to stay, and she agreed. Felinska only remembers one other incident (before her final departure from the Fund) in which she complained to Langone about Brewster, after Brewster berated her for making an improper tax payment on an account.

Finally, on March 29, 1991, Felinska once again tendered her resignation. She met with Langone and told him that she liked the office, liked the people she worked with, and liked the work, but that she could no longer work under Brewster. She gave Langone two examples of what Brewster had done. In one incident, she had asked Brewster for permission to leave the office two hours early for a doctor's appointment and apparently Brewster said words to the effect of "you will leave when I want you to." Brewster eventually gave her permission to leave.

The second problem Felinska described to Langone involved an incident in which Brewster had reprimanded Felinska for making an incorrect entry in the computer,

supposedly after receiving instructions to do so from another employee.

In response to Felinska's complaints, Langone once again asked her to stay. According to Felinska, he repeated the word "stay" three times. Felinska responded "why should I stay?", and reiterated that she could not work with Brewster. When Langone refused to authorize a transfer, she left the meeting. According to Felinska, she changed her mind about resigning only a few minutes after the meeting was over, but by that time, Langone was busy meeting with someone else and so she could not talk to him. Instead, she saw Langone at the end of that day and asked him to allow her to rescind her resignation; this time he refused.

Four months after Felinska resigned, on July 17, 1991,
Felinska wrote to Langone, asking if she could have her job back. Her request was refused. After Felinska's resignation, Tower absorbed most of her duties. In May, 1991, Langone hired Susan Beaulieu to assist Tower in some of Felinska's duties. She remained in this position until January, 1993. In 1995, Langone transferred Tower to another department, and hired a new bookkeeper to perform the duties once performed by Felinska and Tower.

III. DISCUSSION

A. Legal Framework

In an ADEA action, the burden of producing evidence is governed by the framework described in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). Greenberg v. Union Camp Corp., 48 F.3d 22, 26 (1st Cir. 1995). The plaintiff has the initial burden of establishing a prima facie case of discriminatory discharge. This requires the plaintiff to establish that (i) she is over age 40, (ii) that she was performing adequately on the job, (iii) that she was actively or constructively discharged, and (iv) that she was replaced by a person with roughly equivalent job qualifications. Greenberg, 48 F.3d at 26.

Once the plaintiff has met this burden, the employer is obliged to articulate a legitimate reason for the plaintiff's discharge. If the employer has articulated a legitimate reason for the discharge, the burden shifts back to the plaintiff to demonstrate that the articulated reason was a pretext for discriminatory animus. Of course, if the plaintiff fails to produce a prima facie case in the first instance, and in particular fails to show that she was discharged, the inquiry ends at that point, and the plaintiff loses.

Greenberg, 48 F.3d at 27.

Since it is undisputed in this case that plaintiff was not actually discharged, but resigned from her position, she can only succeed if she can demonstrate that her resignation was the result of a constructive discharge. A finding of constructive discharge is warranted when the evidence shows that an employee's "new working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Greenberg, 48 F.3d at 27; Calhoun v. Acme Cleveland Corp. 798 F.2d 559, 561 (1st Cir. 1986) The test is an objective one, and an employee will not prevail simply because she is unreasonably sensitive to her working environment. Rather, the inquiry focuses on the "reasonable state of mind of the putative discriminatee." Greenberg, 48 F.3d at 27; Calhoun, 798 F.2d at 561.

The evidence adduced by plaintiff in this case is insufficient for a rational jury to conclude that she was constructively discharged from her position. The sum total of the difficult or unpleasant working conditions described by plaintiff are as follows:[2]

a) She did not have a friendly relationship with her co-worker Tower, or her supervisor Brewster;

b) She received less training on the computerized accounting system than did Tower, however this did not prevent her from achieving "at least average" ability to use it;

c) The computer terminal was left-handed, while she was right-handed, but this did not prevent her from using it;

d) She was reprimanded for refusing to cooperate with Brewster in locating the missing general ledger, a complaint that she admits in substance;

e) Brewster gave Tower preference in choosing which days she would take as vacation days;

f) Brewster once told her that she "looked like a Gypsy" and that her accent would disqualify her for jury duty;

g) On a number of occasions, Brewster stated to- Felinska, "what do you think, you are not replaceable?";

h) Brewster gave Tower most of the computer-related assignments, and did not permit Felinska to talk directly with the Fund's computer consultants;

i) In March of 1991, Langone gave plaintiff a large bookkeeping assignment to complete "in a few days." When Felinska stated that it would be impossible to complete it on time, Langone threatened to

give the assignment to Tower;[3] and,

j) On March 28, 1991, Brewster instructed Felinska to give her "batch control" work to Tower.

This litany of unpleasant experiences, while surely causing discomfort on plaintiff's part, simply does not rise to the level of a constructive discharge. First, it must be noted that the events described by Felinska took place over a two year period. Plaintiff does not describe continuous harassment or demeaning interactions during this period, but only a series of isolated incidents, most of which cluster over a year prior to her resignation. Compare Aviles-Martinez v. Monroig, 963 F.2d 2, 6 (1st Cir. 1992) (evidence sufficient to find constructive discharge where plaintiff was scolded and ridiculed in front of clients on an almost daily basis).

Also missing from plaintiff's account is any pressure from management to resign. She was never threatened, never given an ultimatum, and never demoted. Her salary was never reduced during the period in question. To the contrary, plaintiff appears to have used the threat of resignation on a number of occasions to extract concessions from management, who appear to have taken steps to placate her in order to prevent her from leaving. Compare Calhoun v. Acme Cleveland Corp.,

798 F.2d 559, 562 (1st Cir. 1986) (evidence sufficient to find a constructive discharge where management repeatedly asked plaintiff to resign, demoted him, and threatened longer working hours unless he resigned).

What the evidence does show is that plaintiff, who had, for 25 years, been the dominant presence in the bookkeeping department, felt threatened by its automation, and by the presence of Tower, who, she acknowledges, had more expertise with computers than did she. While plaintiff did receive some computer training, it is apparent from the record that management intended Tower to be the "computer person" in the bookkeeping department, and that plaintiff's duties would remain primarily those she had always done: manual bookkeeping Plaintiff acknowledges that even though Tower was given the bulk of the computer work, she continued to perform the manual bookkeeping functions.[4]

Plaintiff's pride was, understandably, injured by this change in office dynamics, and Brewster's less than diplomatic treatment clearly exacerbated plaintiff's hurt feelings. However, while this outcome is unfortunate, it does not rise to the level of a compelled resignation. See Hazel v. Postmaster General, 7 F.3d 1, 45 (1st Cir. 1993) (reassignment to a less desirable job held

not to be constructive discharge).

Accordingly, defendant's motion for summary judgment on all remaining counts is ALLOWED.

SO ORDERED.

Dated: February 20, 1996

"S/ _____"
NANCY GERTNER, U.S.D.J.

FOOTNOTES TO OPINION ABOVE:

1. At a hearing on April 29, 1994, Young, J. dismissed Count I as it related to national original discrimination, Count IV (purporting to state a claim under M.G.L. ch. 151B) and Count XIV (purporting to state a claim under ERISA). In a written opinion dated June 8, 1994, Judge Young dismissed Count II (Massachusetts Civil Rights Act), Count V (M.G.L. ch. 93 § 103), Counts VII and VIII (intentional infliction of emotional distress), Count IX (interference with advantageous relations), Count X (negligent misrepresentation), and Count XI (negligent supervision).

2. Certain of plaintiff's evidence was in the form of hearsay and speculation, and has been excluded from this list.
3. Nothing in the record suggests that Langone carried out this threat.
4. At her deposition, plaintiff stated: "But it was two bookkeeping [sic]. One was the manual bookkeeping and one was the computer bookkeeping. So Marilyn was doing more computer bookkeeping. So Marilyn was doing more computer and I have done what I have done all the years."

ORDER ON REHEARING

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1589

MARIA FELINSKA,
Plaintiff, Appellant

v.

NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND,
Defendant, Appellee.

Before
Cyr, Boudin and Lynch, Circuit Judges.

ORDER OF COURT

Entered: November 27, 1996

Upon consideration of appellant's petition for rehearing, it is ordered that said petition be denied.

By the Court:

William H. Ng, Clerk
By: "No signature"

Chief Deputy Clerk.

STATUTORY PROVISION AT ISSUE.

29 U.S.C.§ 623. Prohibition of age discrimination.

- (a) Employer practices
-

It shall be unlawful for an employer -

- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
-
- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
-
- (3) to reduce the wage rate of any employee in order to comply with this chapter.

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No. 96-1910

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARIA FELINSKA,

Petitioner,

v.

NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the First Circuit correctly affirmed the district court's judgment that Petitioner Maria Felinska ("Felinska") was not constructively discharged because of her age when she resigned from Respondent New England Teamster and Trucking Industry Pension Fund ("Fund") for the third time in less than two years, after Fund officials repeatedly urged her not to do so.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1910

MARIA FELINSKA,

Petitioner,

v.

NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent New England Teamsters and Trucking Industry Pension Fund, by its undersigned counsel, submits this brief in opposition to the petition for a writ of certiorari in this case.

STATEMENT OF THE CASE

A. The Employment Action That Gave Rise to Petitioner's Claims.

Respondent New England Teamsters and Trucking Industry Pension Fund ("Fund") hired Petitioner Maria Felinska in 1965, initially as an assistant to the Fund's bookkeeper and later as bookkeeper. Although her work was competent, her supervisors noted that she was sometimes uncooperative, did not delegate, and occasionally had difficulties gettting along with her co-workers.

In 1975, the Fund hired another bookkeeper, Dot Langone, who shared the bookkeeping duties with Felinska until Ms. Langone retired in 1988. In the spring of 1989, Helen Debreceni, then the Fund Manager, approved the request of another Fund employee, Marilyn Tower, to transfer to Langone's position, and assigned Felinska to train her. Felinska did not object to either the transfer or the training assignment.

In the summer of 1989, however, Debreceni made other organizational changes, such as designating Arlene (Doddy) Brewster as supervisor of the unit in which both Felinska and Tower worked. Brewster was somewhat overbearing and tactless with all employees, and she and Felinska did not get along. In addition, Brewster supervised Felinska more closely than Felinska's predecessors had done, and there were altercations between them.

During 1989 and 1990, the Fund began to automate its accounting system. Outside consultants were retained to install the system and to train Felinska and Tower on the computer. Although Felinska claimed that she was denied training and access to the new system, she admitted that the computer was in the room shared by herself and Tower, that she had the opportunity to practice on it, and that the computer consultant trained her to perform a number of key bookkeeping functions on the new system. Tower had more computer expertise than Felinska, however, and sometimes was given computer-related tasks when Felinska was not. Nevertheless, Felinska continued to have primary responsibility for a number of important bookkeeping functions. She maintained her title and position, and she continued to receive salary increases throughout her employment at the Fund.

In February 1990, Felinska resigned in order to take a job with Chemical Bank. Debreceni talked her out of leaving, and Felinska withdrew her retirement notice. In October 1990, Felinska again resigned, this time because her

job made it difficult for her to travel to New York City on the weekend. Debreceni again asked her to stay, and agreed to allow her to leave 15 minutes early every Friday to facilitate her weekend travel. Once again, Felinska changed her mind and decided to stay at the Fund.

In October 1990, Debreceni retired, and Charles Langone became Fund Manager. Langone continued the two-bookkeeper staffing pattern instigated by his predecessors for several reasons. First, he wanted a back-up for Felinska when she was out of the office or on vacation. Second, he wanted a more timely end-of-the-year closing of the Fund's books than Felinska had been able to accomplish alone. Finally, the Fund's outside accountants had advised that two bookkeepers were advisable for control purposes.

Although Felinska subsequently maintained that her working conditions were intolerable during the period she worked for Langone, primarily because of harassment from Brewster, she could only recall complaining to Langone twice prior to her third and final resignation. Even in those instances, she knew only that she said Brewster was "impossible." Although she threatened to quit in January, 1991, Langone asked her to stay and she agreed.

On March 29, 1991, Felinska told Langone that she could no longer work with Brewster, citing two incidents: Brewster questioned her need to leave two hours early, and she instructed Felinska to follow incorrect directions about a computer entry. Langone asked her at least three times to "stay" at the Fund. She refused, insisting that she wanted to leave that day. Later that morning she changed her mind, however, because she liked the Fund, liked working, and liked talking with her friends there. Langone was tired of her pattern of resigning and then changing her mind, and would not let her withdraw her resignation.

Felinska completed the paperwork for retirement without further protest, and began receiving her pension. Four

months later, she filed a written appeal with the Fund, asking to receive the new, higher pension benefits that had been approved after she retired, or to return to Fund employment. The Fund denied her request, just as it denied the request of the numerous other similarly situated pensioners who retired prior to the announcement of the new benefit structure. The Fund also denied her request to return to her bookkeeping position.

B. Proceedings in the Courts Below.

In 1993, Felinska filed a 14-count complaint against the Fund and Langone, alleging violations of various federal and state laws. The district court dismissed nine of her claims in 1994, and granted the Fund's motion for summary judgment as to the remaining counts in 1996. Felinska appealed only the finding that she had not established a prima facie case of age discrimination against the Fund. The Court of Appeals affirmed, and Felinska appealed to this Court.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals is correct, and review by this Court is not warranted. This is a routine employment discrimination case, which presents no conflicts between the circuits, no unresolved or controversial question of federal law, and no departure from Supreme Court precedent. Although Felinska argues that the Court of Appeals' decision is inconsistent with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), she incorrectly cites the rule of those cases and produces no facts supporting her argument.

Felinska argues that the Fund's reasons for its employment action were pretextual, allowing an inference of age discrimination. The Fund's alleged "mendacity" is not at issue. The courts below assumed the truth of Felinska's version of the facts, not the Fund's. Even under Felinska's

facts, she did not prove the third element of a prima facie case of age discrimination under *McDonnell Douglas*: she was not discharged, either actively or constructively. Instead, she voluntarily resigned.

Even if she had proved a prima facie case, the record does not support her claim that the Fund's reasons for assigning an additional bookkeeper to assist Felinska were a pretext to force her to resign. Moreover, Felinska's summary of this Court's *Hicks* decision is incorrect, because she does not acknowledge that *Hicks* requires her to establish a link between the Fund's actions and her age.

REASONS FOR DENYING THE PETITION

I. THE COURTS BELOW CORRECTLY CONCLUDED THAT FELINSKA DID NOT ESTABLISH A *PRIMA FACIE* CASE

In *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), this Court set out the elements of a prima facie case of race discrimination under Title VII. Subsequent decisions of this Court and other courts have applied the *McDonnell Douglas* framework to other forms of discrimination, such as age discrimination. *See, e.g., O'Connor v. Consolidated Coin Caterers Corp.*, —U.S. —, 116 S. Ct. 1307 (1996); *Greenberg v. Union Camp Corp.*, 48 F.3d 22 (1st Cir. 1995). In order to establish a prima facie case of age discrimination, the plaintiff must establish that

> (i) [she] is a member of a protected class, i.e., over forty years of age, (ii) [her] job performance was sufficient to meet [her employer's] legitimate job expectations, (iii) [she] was actually or constructively discharged, and (iv) [her employer] sought a replacement with roughly equivalent qualifications.

Greenberg, 48 F.3d at 26 (citations omitted).

The decisions of the lower courts in this case are consistent with Supreme Court precedent. Felinska could not prove constructive discharge, as required by *McDonnell*

Douglas and its progeny, because her working conditions were not "so difficult or unpleasant that a reasonable person . . . would have felt compelled to resign." *Greenberg*, 48 F.3d at 27 (citation omitted).

Felinska's working conditions were objectively tolerable. She retained her bookkeeper title throughout her tenure at the Fund. In addition, she received salary increases every year at the Fund, including the period beginning in 1989, when she claimed that working conditions became intolerable. A raise of any size indicates the contrary. See e.g., *Stetson v. Nynex Serv. Co.*, 995 F.2d 355, 360-61 (2d Cir. 1993). See also *Nunez-Soto v. Alvarado*, 918 F.2d 1029, 1030-31 (1st Cir. 1990); *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119-20 (1st Cir. 1977); *Schuler v. Polaroid Corp.*, 44 Fair Emp. Prac. Cas. (BNA) 1415 (D. Mass. 1987), *aff'd.*, 848 F.2d 276 (1st Cir. 1988).

Although Felinska claimed that harassment by her supervisor, Doddy Brewster, was intolerable, the incidents she cited were no more than close monitoring and tactless comments about her slow pace. Close monitoring and reprimands, however, are not enough to show that working conditions are intolerable. *See Clowes v. Allegheny Valley Hospital*, 991 F.2d 1159, 1162 (3d Cir. 1993), *cert. denied*, 510 U.S. 964 (1993); *Caslin v. General Electric Co.*, 696 F.2d 45, 46-7 (6th Cir. 1982); *GTE Prods. Corp. v. Stewart*, 421 Mass. 22, 653 N.E. 2d 161 (Mass. 1995).

Moreover, Felinska produced no admissible evidence of comments about age, plans to terminate her or other actions designed to force her out of the Fund. Although she claimed "all her duties" were removed, she admitted to performing at least five important bookkeeping functions until the day of her departure. Reassignment of duties is not in itself evidence of constructive discharge, even if it leaves Plaintiff with work she likes less. *See Schuler*, 44 Fair Emp. Prac. Cas. (BNA) at 1417.

Finally, Felinska's tenure at the Fund demonstrates that conditions were not intolerable. Between 1989 and 1991,

she resigned and then asked to rescind her resignation three times. The last of these resignations forms the basis of this lawsuit. Even then, Felinska changed her mind and asked to return to the Fund, because she liked her work and her co-workers. If a plaintiff seeks or is asked to return, then conditions are not "intolerable" and there is no constructive discharge. *See Radvilas v. Stop & Shop, Inc.*, 18 Mass. App. Ct. 431, 440 n.14, 466 N.E. 832 (1984); *GTE Prods. Corp. v. Stewart*, 421 Mass. 22, 653 N.E. 2d 161 (Mass. 1995); *Contardo v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 753 F. Supp. 406, 411 (D. Mass. 1990). *See also Henn v. National Geographic Society*, 40 Fair Emp. Prac. Cas. (BNA) 1186 (N.D. Ill. 1986), *aff'd.*, 819 F.2d 824 (7th Cir.), *cert. denied*, 484 U.S. 964 (1987). Felinska's conduct belied any claim of intolerable working conditions.

II. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH SUPREME COURT PRECEDENT REGARDING PRETEXT

Felinska's argument about the Fund's alleged "mendacity" is not entirely clear. Assuming she contends that any such allegation obviates the need for establishing a prima facie case, the Fund submits that she has not established either pretext or the nexus with age discrimination that *Hicks* requires.

Throughout all stages of litigation, the plaintiff bears the burden of persuading the trier of fact that discrimination was the reason for the defendant's actions. *See Hicks*, 509 U.S. at 507. Once the defendant has rebutted the prima facie case by articulating a legitimate, nondiscriminatory explanation for its actions, the plaintiff must prove that the articulated reason is a pretext for discrimination. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 720 (1st Cir. 1994); *Schuler*, 44 Fair Emp. Prac. Cas. (BNA) at 1416. To show pretext, the plaintiff must prove both " 'that the proffered

reason was not the true reason for the employee decision' *and* that [discriminatory motive] was." *Hicks*, 509 U.S. at 508 (emphasis added) (quoting *Burdine*, 450 U.S. at 256). Thus, under *Hicks*, a plaintiff fails to carry her burden if she does not show both that the defendant's explanation of its conduct is false *and* that discrimination motivates the employer's actions. Felinska did not satisfy either of the elements required by *Hicks*, and therefore failed to establish pretext.

First, Felinska failed to show that the Fund's reasons for transferring Tower to the bookkeeping department were false. She claimed that the Fund transferred Tower to the bookkeeping department in order to replace her, but produced no evidence of such a plan. Moreover, the record showed that it was consistent Fund practice to employ two bookkeepers, and that this had been the case for much of a 20-year period, including the period in which Felinska was a Fund employee. After Dot Langone retired, leaving Felinska as the only bookkeeper in the department, it was reasonable for the Fund to transfer or hire an individual to fill the vacant position, help Felinska in her bookkeeping duties, and provide a "back-up" in case Felinska was on vacation or unavailable. Felinska was never replaced by Tower, nor was there ever a suggestion that she would be.

Second, even if Felinska had offered sufficient evidence to suggest that the Fund's articulated reasons for transferring Tower were false, she failed to prove that the proffered reasons were a pretext for discrimination, because she did not establish any nexus between the Fund's actions and her age. In failing to do so, she missed the most critical part of the inquiry under *Hicks*: she must show a link between Defendant's alleged "mendacity" and her age. In other words, she must show that the Fund wanted to discharge her *because she was old*. As the Supreme Court noted in *Hicks*:

> . . . a reason cannot be proved to be "a pretext for discrimination" unless it is shown *both that the reason was false, and that discrimination was the real reason.*
>
> Once the defendant "responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the fact finder must then decide" not (as the dissent would have it) whether that evidence is credible, but "whether the rejection was discriminatory within the meaning of Title VII."

509 U.S. at 515-519 (emphasis supplied). *Accord Woodman v. Haemonetics Corp.*, 51 F.3d 1087, 1091-92 (1st Cir. 1995); *Udo v. Tomes*, 54 F.3d 9, 13 (1st Cir. 1995).

Felinska did not even begin to prove that she was terminated because she was old. There was not a single age-related remark alleged in this case. Felinska never complained to any Fund employee about age discrimination during her employment. She does not know whether her experiences were attributable to her age. When asked how the Fund harassed older people, she could only identify a *young* person who was "harassed." The Fund had no pattern of terminating older employees, or indeed, of terminating employees of any age. Two thirds of the Fund's employees were over age 40. Those identified by Felinska as the source of harassment—Debreceni, Brewster, Brown and Hurst—were 64, 57, 61 and 63 at the time of Felinska's resignation in March 1991, only a few years younger than Felinska's age 66. Felinska worked with all of these individuals for many years before she resigned. There was no evidence of age discrimination in this case.

III. FELINSKA HAS PRODUCED NO EVIDENCE OF A GENUINE ISSUE OF MATERIAL FACT WARRANTING TRIAL

Felinska claims that the Court of Appeals "ignored the bulk of the summary judgment record respecting clear disparate treatment in favor of the younger co-worker . . ."

and that summary judgment was therefore inappropriate. Felinska did not identify any part of the record, let alone "the bulk" she claimed. In any case, Felinska's argument does not present any unresolved or controversial question of federal law. Consequently, no issue has been presented for this Court to decide.

IV. THE DECISION OF THE COURT OF APPEALS TURNED UPON THE FACTS OF THE CASE AND WILL NOT AFFECT PERSONS OTHER THAN THE LITIGANTS

The opinions below applied established precedent to the specific facts of this case, not a new or disputed legal theory. There was no departure from that precedent in the application of the law to the facts. Based on the facts, the courts below determined that Felinska was not a victim of age discrimination. The Court of Appeals' decision has no application beyond the factual circumstances presented by this case, and therefore will have little impact on anyone other than the parties to this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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